Supreme Court, U.S.
FILED

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No. (1) 09-271 AUG 28 2009

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IN THE

SUPREME COURT OF THE UNITED STATES

RICHMAN EM,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Petition For Writ Of Certiorari

To The District Court Of Appeals of California,

Fourth Appellate District, Division Three

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner was indicted by a county grand jury at the age of 15 and prosecuted as an adult pursuant to California Welfare and Institutions Code § 707(d)(2). He was found guilty of violating California Penal Code (hereinafter PC) § 187 (Murder in the first degree), as an aider and abettor. Additionally, he was convicted of committing a gang crime (PC §186.22(a)), and an enhancing allegation pursuant to PC §12022.53 (vicariously discharging a firearm causing death, an act perpetrated, in fact, by an adult codefendant) was found to be true. Petitioner was thereafter sentenced to consecutive sentences totaling 50 years to life in prison pursuant to mandatory consecutive sentencing provisions of CPC sections 187 and 12022.53(d) and (e)(1).

The questions presented from these circumstances are: (1) Even in such a serious crime as here, do the mandatory consecutive sentencing provisions of the California Penal Code, when imposed on a 15 year old passive participant, offend the cruel and unusual punishment prohibition of the 8th Amendment to the United States Constitution and Article I § 17 of the California state Constitution?

(2) Were petitioner's due process rights infringed by a conviction based upon insufficient evidence?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest state court to review the merits, the Fourth District Court of Appeal, Division Three, appears at Appendix A to the petition at page 1a and is reported as *People v. Em*, 171 Cal.App.4th 964, — Cal.Rptr. — (Court of Appeal No. G0039806, filed March 3, 2009).

The California Supreme Court denied hearing on June 10, 2009, and the notice of that decision appears at Appendix B at page 1b and is not a published opinion (Supreme Court No. S171835, filed June 10, 2009).

STATEMENT OF JURISDICTION

The date on which the highest state court, the California Supreme Court, decided petitioner's case was June 10, 2009, when the court denied hearing. A copy of that order appears at Appendix B. No petition for rehearing was filed since the order was final upon its filing pursuant to California Rule of Court 8.532(b)(2), and only decisions which are not yet final may petition for rehearing pursuant to California Rule of Court 8.268(a)(1).

The texts of these rules of court are set forth at Appendix G. The jurisdiction of this Court is invoked under 28 U.S.C. section 1257(a). The text of this statute is set for at Appendix E.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of the Eighth Amendment to the US Constitution is set forth in Appendix C, and the text of Article I, § 17 of the California state Constitution is set forth in Appendix D. The texts of the germane California Penal Codes and Welfare and Institutions Code appear in Appendix F. Texts of the Fifth and Fourteenth Amendments appear in Appendix H. California Jury Instruction CALCRIM 401 is set forth in Appendix I.

STATEMENT OF THE CASE

On June 12, 2004, petitioner, at the age of 15 years, was indicted by the Orange County Grand Jury on charges of murder and committing a crime while participating in a criminal street gang. An enhancing allegation charged petitioner with being liable for the discharge of a firearm resulting in death. Two special circumstances were charged, (1) murder in the course of a robbery, and (2) murder to further the interests of a criminal street gang. The special circumstances were later dismissed as to petitioner by the prosecutor.

Petitioner was convicted at trial of murder in the first

degree and having committed the crime while a member of a criminal street gang. He was convicted as and aider and abettor under California's felony murder rule. It was found to be true that he was vicariously liable for discharging a firearm resulting in death, even though the weapon was actually wielded by a co-defendant. The trial judge imposed the sentence required by California law, two consecutive 25 year to life sentences on the murder and the weapon enhancement for a total sentence of 50 years to life. Sentence was stayed on the remaining count alleging the gang activity. The actual shooter, an adult, was sentenced to 50 years to life without parole while the defendant who provided the weapon was sentenced to 10 years in prison and the female driver was sentenced to 1278 days in jail. Petitioner appealed.

In his appeal, petitioner argued there was insufficient evidence to support his conviction on the aiding and abetting theory adopted by the jury and that the 50 year to life sentence violated the cruel and unusual punishment prohibitions of the 8th Amendment to the U.S. Constitution and Article I, Section 17 of the California state constitution. The court ruled on the merits of the latter issue despite its not having been raised in the trial court. As in *Bible v. Department of Corrections*, (9th Cir. July 1, 2009) No. 07-99017, D.C. No. CV-98-01859-PGR (certified for publication), there appears to be no reasonable probability

that a different result would have resulted had the issue been addressed by the trial court.

On March 3, 2009, the Fourth District Court of Appeal, Division Three, affirmed petitioner's conviction and sentence. It is noteworthy that the opinion was unanimous as to the guilt of petitioner, but Justice Eileen Moore wrote a passionate dissent as to the sentence, arguing that someone of petitioner's age and immaturity who was a "passive" participant in the crime should receive concurrent sentences rather than consecutive terms.

> "A 50 year prison term should be reserved for our worst offenders. A 50-year-to-life term for an immature 15-year old with an underdeveloped sense of responsibility, who was an aider and abettor and not the shooter, and who had a relatively minor criminal record, is not within the limits of civilized standards. It is cruel and unusual punishment." Justice Moore's dissent, *People v. Em*, *supra.*, at 981.

Petitioner's petition for review to the California Supreme Court was denied on June 10, 2009, thus exhausting petitioner's state court remedies. Significantly, two justices of the state Supreme Court voted in favor of granting the requested hearing

(Justices Kennard and Werdegar). This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE PETITION

Due process of law is guaranteed in both the 5th and 14th amendments to the United States Constitution. One of the most basic rights secured by due process is protection against incarceration without a fair trial, presumably one in which a conviction will be had only on sufficient and competent evidence. The only evidence of petitioner's participation in this crime consisted of the tape of his interview with the police in which he provided varying accounts of his activities at the time of and following the crime. None of those acknowledged any shared intent or physical assistance to the codefendant who shot the victim. A reasonable interpretation of petitioner's statements establishes merely his presence and observation of the event, not any form of active participation. Even the probation report submitted to the trial court describes petitioner as a "passive participant," a view adopted by Justice Moore of the Fourth District Court of Appeals in her dissent, a portion of which is quoted below. In *People v. Nguyen* (1993) 21 Cal.App.4th 518, 26 Cal.Rptr. 323, the California appellate court dealt with a similar set of circumstances:

"[m]ere presence at the scene of a crime

> is not sufficient to constitute aiding and abetting, nor is the failure to take action to prevent a crime . . . . Likewise, knowledge of another's criminal purpose is not sufficient for aiding and abetting; the defendant must also share that purpose or intend to commit, encourage, or facilitate the commission of the crime." *Nguyen, supra.*, at 529-530 (see also CALCRIM No. 401).

While it is true he may be technically eligible for parole some day, petitioner is serving the functional equivalent of a life without parole sentence. Most of his life will be over before he first would be eligible for parole. Even once he should become eligible, the California Department of Parole is notorious for not granting parole to murderers, especially those convicted of first degree murder. Even when the rare parole has been granted, it is usually the result of judicial intervention. Moreover, the past several governors of California have openly displayed policies of vetoing the few parole recommendations for eligible murder convicts which have taken place. The public, in its zeal to quell the rising tide of gang crime, enacted, through the initiative process, the statute that permitted petitioner to be tried as an adult and sentenced to the mandatory consecutive 25 year to life

sentence in addition to his sentence for murder. There is little, if any, distinction between the future of petitioner and a prisoner serving a life without parole sentence.

The California Supreme Court addressed the issue of a minor being sentenced to life without parole in *People v. Dillon*, 34 Cal. 3d 441. In that case, a 17 year old planned and prepared, in conjunction with others, a robbery of a marijuana grower. Armed with a firearm, Dillon proceeded to actually shoot the victim to death. In setting aside his life without parole sentence, the court stated, "in some first degree felony-murder cases this procrustean penalty may violate the prohibition of the California constitution against cruel or unusual punishments. (Ca. Const., art. I, § 17.)" *Dillon, supra.*, at 477. While recognizing the validity of the felony-murder rule, the court nevertheless emphasized that punishment should be proportional to a defendant's individual culpability.

> "Finally, we take note of the recent United States Supreme Court case of *Enmund v. Florida* (1982) supra, 458 US 782 [73 L.Ed. 1140, 102 S.Ct. 3368]; although it deals with the federal constitutional prohibition against cruel and unusual punishment, the reasoning of the opinion is instructive. . .

> . The court explained that 'The question before us is not the disproportionality of death as a penalty for murder, but rather the validity of capital punishment for Enmund's own conduct. The focus must be on his culpability, not on that of those who committed the robbery and shot the victims, for we insist on "individualized consideration as a constitutional requirement in imposing the death sentence," [citation] which means that we must focus on "relevant facets of the character and record of the individual offender."' (Italics in original; id., at p. 798 [73 L.Ed.2d at p. 1152, 102 S.Ct. at p. 3377].)"

Petitioner's conduct, by the accounts of the probation report and the implicit findings in the dissenting opinion of Justice Moore of the district court of appeal, was far less culpable than that of either the defendant in *Dillon* or *Enmund* and yet he received little or no consideration for that in the sentence he received. Petitioner, when this crime was committed and when he was sentenced, could not vote, could not buy liquor, could not buy cigarettes, could not marry, could not drive, could not enlist in

the military, could not enter into a binding contract. All because a person of his age is presumed by society to be too immature, too inexperienced, too malleable to the influences of others, and just not capable of making even minor decisions on his own behalf. Yet the one size fits all sentencing scheme under which he was sentenced has subjected him to a draconian sentence, just as it would have the most hardened and experienced criminal. As applied to this petitioner, the 50 years to life sentence does shock the conscience and calls out for relief.

CONCLUSION

WHEREFORE, petitioner requests that a writ of certiorari issue from this Honorable Court to review the judgment of the California District Court of Appeal, Fourth District, Division Three.

Respectfully submitted,

Buddy Clark
Counsel for Petitioner

Clarence Edward Haynes
Co-counsel for Petitioner

Date: August 28, 2009

APPENDIX A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,
Plaintiff and Respondent, G039806

v. (Super. Ct. No. 06ZF0140)

RICHMAN EM, OPINION
Defendant and Appellant.

_____/

Appeal from a judgment of the Superior Court of Orange County,
William R. Froeberg, Judge. Affirmed.

Gregory Marshall, under appointment by the Court of Appeal, for
Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Gary W. Schons, Assistant Attorney General, Jeffrey J. Koch,
Pamela Ratner Sobeck and James Flaherty, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Richman Em appeals from a judgment finding him guilty of the first degree murder of Miguel Davila, and from the two consecutive 25-years-to-life sentences imposed upon him. Mr. Davila was the innocent victim of a murder during

a robbery by gang members, including defendant. We affirm. Substantial evidence supported defendant's murder conviction. Defendant was charged with aiding and abetting or being part of a conspiracy to commit the underlying crime of robbery, and was convicted of murder based on the felony-murder doctrine. Defendant's sentence is not cruel or unusual punishment under either the California Constitution or the United States Constitution even though defendant was 15 years and nine months old when Mr. Davila was murdered.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

Shortly after midnight on May 11, 2006, while sitting in his parked police cruiser, Garden Grove Police Officer David Scroggins heard four shots fired nearby. He looked toward a self-service carwash across the street from where he was parked, and saw two people running. Officer Scroggins saw a Toyota Corolla emerge from the carwash; he followed it and initiated a felony vehicle stop. Four persons were in the car: defendant, Narong Thongdeng, Joshua Richards, and Sharon Pech. A handgun was partially concealed below the driver's seat, and a blue-and-white bandana was on the backseat.

Another officer, Timothy Kovacs, was dispatched to the carwash, where he found Mr. Davila in the driver's seat of his car. Mr. Davila had been shot several times. Officer Kovacs asked him what had happened; Mr. Davila replied, "they shot me." When asked who had done this, Mr. Davila replied "two Asian guys" who were wearing bandanas. (Richards is not Asian; defendant is Asian.) Three bullet casings were found in Mr. Davila's car, and one was found outside the front passenger side door.

Mr. Davila died as a result of exsanguination. An autopsy revealed four bullets had penetrated Mr. Davila's body; two had caused the fatal injuries.

Later in the morning of May 11, defendant was interviewed at

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[1]In accord with our standard of review on appeal, we present the facts in the manner most favorable to the judgment. (*People v. Dayan* (1995) 34 Cal. App. 4th 707,709.)

the police station by Detectives McLeod and Ashby.[2] Defendant admitted he was "jumped into" the Exotic Family City Crips (EFCC) gang in January 2005; the gang had about 30 members, most of whom were Cambodian. Defendant's moniker was "Lolo."

Defendant told the officers he had met Thongdeng, whose moniker was "Thug," the previous day. Thongdeng and Pech picked up defendant in Wilmington and drove to Long Beach about 10:30 p.m. on May 10. They picked up Richards, drove to Garden Grove, and pulled into the carwash. Defendant initially told the officers he got out of the car to urinate, heard gunshots, and saw Thongdeng running back to the car. Defendant further said that, after he hopped back in the car, Thongdeng tossed a gun to him; defendant slid it under the driver's seat before the car was stopped by Officer Scroggins.

As the interview continued, defendant changed his story. Ultimately, defendant stated that, after he urinated, he went back to the car, where Thongdeng and Richards said, "they wanted to steal [Mr.Davila's] car and stuff." Richards had a gun in his pocket, and had given it to Thongdeng when they arrived at the carwash. Defendant and Richards told Thongdeng "it's on" him if he wanted to do it. Defendant stated, "I
didn't know he was going to shoot him. I thought he was going to take the car." Defendant saw Thongdeng demand money and car keys from Mr. Davila, and then saw Thongdeng shoot Mr. Davila.

When defendant, Thongdeng, and Richards got back in the car, Richards said to Thongdeng, "[m]an, I should have never gave it [the gun] to you. I knew you was going to pop him." Then one of the detectives asked defendant, "[w]hat'd you and [Richards] say when [Thongdeng] came up with the idea to rob

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[2]Defendant did not testify at trial. The facts regarding the police interview come from the audio recording of the interview, which was played during trial, and the transcript of the interview, which was provided to the jury.

this guy," defendant responded, "we didn't say nothing. It was like ... we just said it's on you .... ¶...¶ We didn't say nothing. We just said it's on you if you want to do it and he said, yeah, I'm a ... he's just like, "Well, give it to me. I'm gonna do it.' He just came up to him and did it."

At trial, a gang expert testified the EFCC gang was an Asian gang, also known as the Exotic Family City Crips. The gang had more than 80 members, and was located in Long Beach. EFCC members primarily commit crimes such as burglaries, home invasion robberies, auto thefts, assaults, shootings, stabbings, homicides, and crimes involving narcotics and firearms. The blue-and-white bandana found in the Toyota Corolla was typical of EFCC attire. Defendant had tattoos reading "EFCC" and "Lolo," as well as a tattoo of five dots signifying he was an Asian gang member, and tattoos of an "E" and an "F" on his arms and shoulders. The dark clothing defendant was wearing at the time of Mr. Davila's shooting would assist a gang member in committing crimes at night without being seen, and would make it more difficult to identify him later.

The gang expert testified defendant, Thongdeng, and Richards were all gang members of the EFCC gang. Defendant had admitted his gang membership to police officers in the past. The expert opined that defendant was an active member of the EFCC gang on May 11, 2006.

Defendant was charged in an indictment with murder (Pen. Code §187, subd. (a)) and active participation in a criminal street gang (id., §186.22, subd. (a)). The indictment alleged defendant was liable for the vicarious discharge of a firearm by a gang member, causing death (id., §12022.53, subds. (d) & (e)(1)),[3]

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[3] The firearm discharge enhancement in Penal Code section 12022.53, subdivision (d) requires the imposition of a consecutive term of imprisonment of 25 years to life if a defendant personally and intentionally discharges a firearm, causing death or great bodily injury: Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), Section 246, or subdivision (c)or (d) of Section 12034,

and the murder had been committed for the benefit of, at the direction of, or in association with a criminal street gang (id., §186.22, subd. (b)).[4]

A jury found defendant guilty of both counts, and found the enhancement allegations to be true. Defendant was sentenced to a total of 50 years to life. He as sentenced to 25 years to life for Mr. Davila's murder, and to a consecutive term of 25 years to life on the firearm enhancement. Pursuant to Penal Code section 654, sentence on the conviction for active participation in a criminal street gang was stayed; pursuant to section 1022.53, subdivision (e)(2), sentence on the gang enhancement was stricken.

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personally and intentionally discharges a firearm and proximately causes great bodily injury, as defined in Section 12022.7, or death, to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life. Subdivision (e)(1) of section 12022.53 makes the enhancement applicable to a vicarious shooter, like defendant in this case, if it is proven that the crime was committed for the benefit of, at the direction of, or in association with a criminal street gang, and if any principal in the crime personally and intentionally discharged a firearm, resulting in death or great bodily injury: The commission of an offense if both of the following are pled and proved: [paragraph](A) The person violated subdivision (b) of Section 186.22 [paragraph] (B) Any principal in the offense committed any act specified in subdivision (b),(c),or(d).

[4]Before trial, the trial court granted the prosecution s motion to dismiss allegations that special circumstances applied.

DISCUSSION

I.

THE EVIDENCE IS SUFFICIENT TO SUPPORT THE JUDGMENT AGAINST DEFENDANT.

Defendant argues there was insufficient evidence to prove he aided and abetted the commission of or conspired to commit any crime. "In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation." (*People v. Steele* (2002) 27 Cal. 4th 1230, 1249.) We presume in support of the judgment the existence of every fact that could reasonably be deduced from the evidence. (*People v. Kraft* (2000) 23 Cal. 4th 978,1053). We may reverse for lack of substantial evidence only if '"upon no hypothesis whatever is there sufficient evidence to support'" the conviction. (*People v. Bolin* (1998) 18 Cal. 4th 297,331.)

Defendant was charged with murder under a theory of felony murder. Defendant's liability for Mr. Davila's murder was based on aiding and abetting the commission of or conspiring to commit robbery; there is no dispute that Thongdeng was the actual shooter. To establish defendant's liability as an aider and abettor, the prosecution was required to prove defendant knew of Thongdeng's unlawful purpose , and intended to and did aid, facilitate, promote, encourage, or instigate Thongdeng's commission of the crime. (*People v. Prettyman* (1996) 14 Cal. 4th 248,259; *People v. Beeman* (1984) 35 Cal. 3d 547, 560-561.) Presence at the scene of a crime, alone, is insufficient to establish aiding and abetting liability. (*People v. Nguyen* (1993) 21 Cal. App. 4th 518,529-530.) To establish defendant's liability as a coconspirator, the proscution was required to prove defendant intended to and did agree with Thongdeng and Richards to commit a robbery, defendant intended that one of them would commit the robbery, and one member of the conspiracy committed an overt act to accomplish the robbery. (*People v. Williams* (2008) 161 Cal App. 4th 705,710.)

Defendant acknowledges he knew Thongdeng had a gun

and intended to rob Mr. Davila. Defendant also admits he moved "close" to where Thongdeng was standing when Thongdeng shot Mr. Davila. As he was dying, Mr. Davila told Officer Kovacs he saw "two Asian guys." However, defendant argues there was no evidence he had the intent to accomplish, encourage, or facilitate Thongdeng's robbery of Mr. Davila.

The evidence, and the inferences that can reasonably be drawn from it, fully support defendant's conviction. Mr. Davila told Officer Kovacs two Asian "guys" wearing bandanas shot him. Mr. Davila's statement was properly admitted under the dying declaration exception to the hearsay rule. (Evid. Code, §1242.) From this evidence, the jury could reasonable infer defendant was wearing gang paraphernalia, and was close enough to Thongdeng when he approached Mr. Davila that defendant and Thongdeng appeared to be together. Defendant and Thongdeng (as well as Richards) were members of a criminal street gang that regularly committed violent crimes, including auto thefts and home invasion robberies. Defendant hid the gun under the seat of the car as they left the scene of the shooting. When questioned by the police, defendant initially attempted to distance himself from Thongdeng at the scene of the crime.

Detective McLeod testified at trial about the manner in which gang members work together in committing crimes, including the use of backups to support the gang member committing the crime. Gang members rarely commit crimes on their own, but only bring along those gang members they trust when committing crimes. A gang gun would only be given to someone a gang member had complete trust in; Thongdeng gave the gun to defendant, and defendant attempted to hide it after the robbery and murder.

Defendant was an integral part of the robbery and, under the felony-murder rule, guilty of murder. Based on all the foregoing, we conclude the record contains substantial evidence of defendant's participation in the crime as an aider and abettor or a coconspirator.

II.

DEFENDANT'S SENTENCE IS NOT DISPROPORTIONATE TO THE CRIME, AND THEREFORE DOES NOT CONSTITUTE CRUEL OR UNUSUAL PUNISHMENT

Defendant argues his sentence, consisting of two consecutive 25-to-life terms, is unconstitutional under the California and United states Constitutions' bans on cruel or unusual punishment.[5] "Whether a punishment is cruel or unusual is a question of law for the appellate court, but the underlying disputed facts must be viewed in the light most favorable to the judgment." (*People v. Martinez* (1999) 76 Cal. App. 4th 489, 496.) Penal Code section 12022.53, subdivisions (d) and (e)(1), requires the trial court to impose consecutive sentence if the enhancement created by that section has been proven; therefore, the trial court was without discretion to impose the two 25-to-life terms concurrently.[6] The issue before us is not whether the trial court abused its discretion by failing to impose the indeterminate terms concurrently – which it was prohibited from doing– but whether the sentence the trial court

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[5]Defendant forfeited this argument by failing to raise it in the trial court in the first instance. (*People v. Norman* (2003) 109 Cal. App. 4th 221, 229.) We will nevertheless reach the merits under the relevant constitutional standards, in the interest of judicial economy to prevent the inevitable ineffectiveness-of-counsel claim. (Id. At p. 230.)

[6]Penal Code section 12022.53 , subdivision (d) provides, in relevant part: [A]ny person who, in the commission of a felony specified in subdivision (a) ... personally and intentionally discharges a firearm and proximately causes ... death, to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life. (Italics added.) Murder is a felony specified in subdivision (a). (Pen. Code section 12022.53, subd. (a)(1).) Although defendant did not personally discharge the firearm, he was nevertheless subject to the enhancement. (See ante, fn. 3.)

was required to impose on defendant by statute constitutes cruel or unusual punishment.

A. *California Constitution*

Article I, section 17 of the California Constitution prohibits infliction of "[c]ruel or unusual punishment." A sentence may violate this prohibition if '"it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.'" (*People v. Dillon* (1983) 34 Cal. 3d 441,478 (Dillon).)

Under the California Constitution, we use a three-pronged test to determine whether a particular sentence is disproportionate to the offense for which it is imposed. First, we examine "the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society." (In re Lynch (1972) 8 Cal. 3d. 410,425.) Second, we compare the punishment imposed with punishments prescribed by California law for more serious offenses. (Id. at pp. 426-427.) Third, we compare the punishment imposed with punishments prescribed by other jurisdictions for the same offense. (Id. at pp. 427-429.) Defendant must overcome a "considerable burden" to show the sentence is disproportionate to his level of culpability. (*People v. Wingo* (1975) 14 Cal. 3d 169,174.) Therefore, "[f]indings of disproportionality have occurred with exquisite rarity in the case law." (*People v. Weddle* (1991) 1 Cal. App. 4th 1190,2296.)

Defendant argues only that the sentence imposed on him violates the first prong of the test, namely, the nature of the offense and the offender, with particular regard to the degree of danger both present to society. We examine both the seriousness of the crime in the abstract and "the totality of the circumstances surrounding the commission of the offense ... , including such factors as its motive, the way it was committed, the extent of the defendant's involvement, and the consequences of his acts." (*Dillon, supra*, 34 Cal. 3d. at p. 479.)

There can be no dispute that murder is a serious crime, and that armed robbery and the use of a gun by a gang member in the commission of a crime present a significant degree of danger to society. Life sentences pass constitutional muster for those convicted of aiding and abetting murder, and for those guilty of felony murder who did not intend to kill. (See *People v. Smith*

(1986) 187 Cal App. 3d 666,683-683; *People v. Kelly* (1986) 183 Cal. App. 3d 1235, 1244-1247.) Additionally, a sentence enhancement of 25 years to life is not disproportionate to a violation of Penal Code section 12022.53; the Legislature has determined that a significant increase in punishment is necessary and appropriate to protect citizens and deter violent crime.(*People v. Gonzales* (2001) 87 Cal. App. 4th 1, 16 (*Gonzales*); *People v. Martinez*, *supra*, 76 Cal App. 4th pp. 493-495.)

Dillon, *supra*, 34 Cal. 3d at page 479, on which defendant relies, holds that murder committed in the commission of a robbery is a serious crime presenting a high level of danger to society. In that case, however, the Supreme Court concluded the facts of the specific crime in question and the defendant's culpability weighed in favor of concluding the imposition of a life sentence constituted cruel and unusual punishment (Id.. at pp. 488-489.) Of course, the facts of Dillon were central to our Supreme Court's conclusion. The shooting in Dillon occurred during an attempt to steal marijuana plants the victim was cultivating. (Id. at pp. 451-452.) The defendant had previously overheard the victim threaten to shoot anyone coming on his property. (Id. at p. 451.) An accidental firearm discharge during the attempted robbery alerted the victim to the presence of the defendant and his cohorts. (Id. at p. 452.) The defendant heard the victim approaching, saw him carrying the shotgun, and, "[w]hen [the victim] drew near, defendant began rapidly firing his rifle at him." (*Ibid.*)[7] The facts in Dillon contrast dramatically

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[7]It is also significant that in *Dillon*, *supra*, 34 Cal 3d at pages 485-486, the trial court did not originally sentence the defendant to prison, but instead committed him to the Youth Authority. Indeed, the jury foreperson wrote a letter to the court after trial, "confirming the jury's unwillingness to return the verdict compelled by the felony-murder rule" (*Id.* at p. 484) and implor[ing] the court to commit the defendant to the Youth Authority rather than sentencing him to state prison (Id. at p. 485). When the defendant appealed, the People attacked the commitment order as in excess of the trial court's jurisdiction.

with the ambush robbery and murder of Mr. Davila, an innocent person sitting in his car.

In considering how this particular crime was committed, and defendant's culpability, we consider the well-reasoned analysis of Gonzales, supra, 87 Cal. App. 4th 1, which presents a similar factual pattern. In that case, three gang members, two 16 year olds (Steven Gonzales and Michael Gonzales, Jr.) And one 14 year old (Manuel Jimenez), were involved in a fistfight with two other youths (Id. At pp. 6-7.) Jimenez was carrying a gun; during the fight, he shot one of the other youths in the head, killing him. (Id. at p.7.) All three defendants were convicted of first degree murder, and the jury found true the allegations under Penal Code sections 186.22, subdivision (b) and 12022.53, subdivisions (d) and (e). (*Gonzales, supra* at p. 7.) Each was sentenced to a total term of 50 years to life in prison. (*Ibid.*)

In rejecting Steven and Michael's claims that the sentences resulted in cruel and unusual punishment, Justice Epstein, writing for the appellate court explained: "Steven and Michael base their arguments on the fact that they were aiders and abettors, rather than the shooter. They acknowledge, as they must, that first degree murder is an extremely dangerous crime, but they ask us to focus on the nature of the enhancement for vicarious use of the firearm. They characterize the acts they committed as engaging in a fistfight Of which murder was the natural and probable consequence. Again ignoring the evidence that Jimenez openly carried a gun on the way to the fight, Steven and Michael emphasize that the jury did not find they knew Jimenez had a gun and intended to use it. Based on this mischaracterization of the evidence, they argue it is cruel and unusual to impose the additional 25-year-to-life enhancement. [¶] The evidence presents a more serious picture of the crime and the facts surrounding its commission. The defendants were

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(Id. at p. 486.) The Court of Appeal found the defendant was ineligible for commitment to the Youth Authority as a matter of law, leaving the trial court with no choice but to impose a life sentence on the defendant. (Id. at pp. 486-487.)

gang members. Jimenez had borrowed a gun. He and Steven went to Michael's house the day before the shooting and Jimenez told Steven he had a gun. Jimenez took the gun with him on the day of the shooting to a barbecue in Azusa Canyon. After the barbecue, the defendants encountered the victims as they drove back to Michael's house. They got out of their car and went to attack the victim and his companion because of their belief that the two had flashed the signs of a rival gang, thus disrespecting Michael's pregnant girlfriend, who was in the car with them. Jimenez carried the gun openly as they advanced on Llamas, and he pointed it at him. Llamas lunged for the weapon and the fight ensued. At one point, Michael called for Jimenez to shoot Llamas. There was evidence that Jimenez shot Llamas while one or more of the other defendants was holding Llamas down. The bullet entered the top of Llamas' head and exited through his mouth. The path of the bullet was consistent with Llamas being on the ground in a prone position when the gun was fired. These circumstances are far more serious than defendants indicate. None of them is extenuating. [¶] The second factor is the nature of the offender and defendant's individual culpability. Steven had suffered a single prior juvenile case adjudication for possession of marijuana/hashish for sale. He argues that this relatively minor record weighs in favor of a finding of cruel and unusual punishment. It does, but the circumstances of Steven's particular violation in the imposition of the 50-year-to-life sentences on Steven and Michael." (Gonzales, supra, 87 Cal. App. 4th at pp. 16-17.)

Defendant claims Gonzales is "manifestly different" from the present case because, he argues, the defendants in Gonzales were participating in a "gang payback assault" and held the victim down while Jimenez shot him. But Gonzales is similar to this case and we employ the same analytical framework in deciding the constitutionality of defendant's sentence. Whether a gang member holds the victim down, or accompanies a fellow gang member to commit an armed robbery, he or she is providing integral assistance to the commission of the crime. Indeed, the prosecution's gang expert testified gang members commit crimes together, rather than individually, because they provide assistance and support for each other.

We next address defendant's own culpability for the commission of the crime.

Defendant argues the murder of Mr. Davila involved little planning, and points out Thongdeng, not defendant, pulled the trigger. The small amount of planning and randomness of the crime, however, do not negate the cold-blooded nature of Mr. Davila's murder. The evidence established defendant and two of his fellow gang members came upon Mr. Davila, a 26-year-old man, alone in his car in a carwash around midnight, and decided to rob him and steal his car. Defendant knew Thongdeng had a loaded gun. Defendant, wearing gang paraphernalia, walked up to Mr. Davila's car alongside Thongdeng. Thongdeng demanded Mr. Davila's money and car keys, and then shot him multiple times. After Mr. Davila was shot, defendant provided no assistance to him, instead leaving him to bleed to death. Back in the car, defendant took possession of the gun used to kill Mr. Davila and tried to hide it. Although defendant did not shoot the gun himself, the robbery and murder took place with his culpable involvement. Defendant's participation in the crime was demonstrably not "passive," as described in the probation report.

Defendant also asks us to consider his age at the time of the crime, 15 years and nine months, and his alleged "immaturity." Many California cases since Dillon have upheld life sentences, with and without the possibility of parole, for defendants under 18 years of age, against constitutional challenges. (See *Gonzales*, *supra*, 87 Cal. App. 4th 1; *People v. Thongvillay* (1998) 62 Cal. App. 4th 71,87-89 [upholding 25-years-to-life sentence of 17 year old convicted of felony murder]; *People v. Guinn* (1994) 28 Cal. App. 4th 1130, 1145-1147 [upholding a life-without-possibility-of-parole term for 17 year old convicted of robbery murder]; *People v. Hankey* (1989) 215 Cal App. 3d 510 [upholding 25 years-to-life term for non-shooter convicted of robbery murder despite his youth, his lack of prior convictions, and possibility he did not intend to kill]; *People v. Harpool* (1984) 155 Cal App. 3d 877 [upholding 25-years-to-life term for youth convicted of robbery murder despite his age and no felony priors].)

When considering whether a sentence is cruel and unusual punishment, the defendant's age matters. (*Dillon*, *supra*,34 Cal.

3d at p. 479.) It is also manifestly true, however, that murder matters. (See generally Kennedy v. Louisiana (2008) 554 U.S. [128 S.Ct. 2641, 2650 -2651] [imposition of the death penalty may be unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution when the victim was not killed]; see also *Dillon*, *supra*, 34 Cal. 3d at p. 479 [felony murder occurring during robbery "presents a high level of ... danger, second only to deliberate and premeditated murder with malice aforethought"].)

In contrast to *Dillon*, *supra*, 34 Cal. 3d at page 488, where the defendant offered expert testimony as to the fact he was an "unusually immature youth," here the only evidence of defendant's maturity is one conclusory statement in the probation report that defendant "presented himself as very frightened and is obviously immature." This statement by the probation officer is one factor, among many, to consider, but it is not dispositive of the question of the constitutionality of defendant's sentence.

Although defendant's prior record was not extensive, his previous juvenile adjudication was for possession of a concealed dirk or dagger (Penal Code section 12020, subd. (a)(4)), and he was placed on formal probation. One of the terms of his probation was to not associate with any members of the EFCC gang. Defendant had many probation violations, including violations relating to gang graffiti, and he was on house arrest, as the result of one of those probation violations, when he left home with Thongdeng and Pech the night of Mr. Davila was murdered. Defendant has proven himself to be complete resistant to the rules and structures of civilized society and the criminal justice system, and to be indifferent to basic social mores. The danger he presents to society is signicant. Defendant committed this crime, not because he was in the wrong place at the wrong time, but because he has a complete disregard for the rule of law and lack of respect for human life.

Defendant was 15 years and nine months old when Mr. Davila was murdered, and, according to the probation officer, he was immature. When balanced against the seriousness of the crime, defendant's active participation in Mr. Davila's robbery and murder, the senseless and cold-blooded nature of the murder, defendant's prior gang-related criminal history, and

the danger he presents to society, we hold defendant's sentence was not disproportionate to the crime for which it was imposed, based on the first prong of the *In re Lynch* test.

B. *United States Constitution*

The Eighth Amendment to the United States Constitution states, "[e]xcessive bail shall not be required, not excessive fines imposed, nor cruel and unusual punishments inflicted." (U.S. Const., 8th Amend.) "The Eighth Amendment, which forbids cruel and unusual punishments, contains a 'narrow proportionality principle' that 'applies to noncapital sentences.'" (*Ewing v. California* (2003) 538 U.S. 11,20.) The appropriate standard for determining whether a particular sentence for a term of years violates the Eighth Amendment is gross disproportionality. That is, "[t]he Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime. [Citations.]" (*Harmelin v. Michigan* (1991) 501 U.S. 957,1001 (conc. opn. of Kennedy, J.), citing Solem v. Helm (1983) 463 U.S. 277,288.) Successful grossly disproportionate challenges are '"exceedingly rare'" and appear only in an '"extreme'" case. (*Lockyer v. Andrade* (2003) 538 U.S. 63,73.)

The companion cases of Ewing v. California and *Lockyer v. Andrade* from the United States Supreme Court must provide the basis for or analysis of whether defendant's sentence was disproportionate under the Eighth Amendment. Ewing was sentenced to a term of 25 years to life under the California Three Strikes law for stealing three golf clubs priced at $399 each, as petty theft with a prior conviction for theft. (Ewing v. California, supra, 538 U.S. at pp. 18,20.) The Supreme Court applied the principles of gross disproportionality and deference to legislative policy choices to conclude that Ewing's sentence of 25 years to life "is not grossly disproportionate and therefore does not violate the Eighth Amendment's prohibition on cruel and unusual punishments." (Id. at pp. 30-31.)

Andrade was sentenced under California' Three Strikes law to two consecutive terms of 25 years to life on two counts of petty theft with prior theft-related convictions (*Lockyer v. Andrade*, *supra*, 538 U.S. at p. 68.) On habeas corpus review, the United States Supreme Court rejected Andrade's claim that

his sentence violated the prohibition against cruel and unusual punishment, holding "it was not an unreasonable application of our clearly established law for the California Court of Appeal to affirm Andrade's sentence of two consecutive terms of 25 years to life in prison." (Id. at p. 77.)

If terms of 25 years to life and 50 years to life are not "'grossly disproportionate'" for petty theft with prior felony convictions, then defendant's total sentence of 50 years to life is not grossly disporportionate to the crime of murder, with a gang enhancement for the vicarious discharge of a firearm resulting in death.

DISPOSITION

The judgment is affirmed.

FYBEL, J.

I CONCUR:

BEDSWORTH, ACTING P.J.

MOORE, J., Concurring and Dissenting.

I concur with my colleagues that there is substantial evidence to support defendant's murder conviction based on the felony murder rule. But I think his sentence of two life sentences, running consecutively and totaling 50 years to life, is disproportionate and cannot withstand scrutiny under either the California Constitution or the United States Constitution.

At the time of the murder, defendant was 15. He was passively involved and immature. Two sentences of 25 years to life, running concurrently, instead of consecutively, would withstand scrutiny. With such a sentence defendant would be stiffly punished, the public would be protected, corrections officials would be able to gauge any attempts defendant made to rehabilitate himself, and should he earn parole, defendant would still have some opportunity at living a normal life. Society would be served if defendant had a glimmer of hope to motivate him to rehabilitate.

The probation report has some information about defendant, although it is difficult to glean exactly what the truth is since

defendant, himself, is the source of much of the information in the report. He was born on July 30, 1990. He never met his father. Concerned that he was at risk, his mother shipped him off to live with other family members in Victorville for two years, until he became homesick. Once home again, "he immediately began having 'racial problems' with the Hispanic community" and was offered protection by an Asian criminal street gang.

Defendant told the probation officer he resisted the gang's early attempts to recruit him, but when he was 14 he began associating with them. He said at one point he tried to disassociate himself, but they "jumped" him "for disrespecting the gang." In 2005, while he was still 14, he was arrested for possessing a dirk or dagger. At that time, he admitted he was a member of a criminal street gang and had the moniker of "Baby Lazy."

In 2006, he asked his mother if he could switch high schools to get away from the gang element, so his mother drove him to a high school in a different city on her way to work. But three days prior to their killing of Miguel Davila, while shopping for shoes, defendant ran into his codefendant, Thongdeng. By them he was 15 years old.

In discussing the situation, the probation officer noted: "He subsequently found himself torn between what was expected by his friends and what he knew would be in his best interest ..." On the night of the murder, defendant was at home under house arrest because of his previous crime, and had already refused to go out with one friend, then Thongdeng arrived at his house. He said he agreed to go out on the condition he would be back home in 30 minutes. According to defendant, a short time later, while at the carwash, when he realized Thongdeng had decided to rob Davila, he told him to "chill."

The probation officer summed up the situation: "The defendant was an active participant in gang activity and was vicariously armed at the time of this offense. He may have been a passive participant but he was nevertheless equally involved. Assuming the defendant is telling the truth and did not know in advance what they were going to do, he could have left upon realizing what the co-defendant was doing. Instead, by his own admission he followed after him and at the very least, stood by

and watched. Later, as they were leaving he made eye contact with the victim who was crying out in pain and honking the horn in an effort to signal for help. [¶] The defendant has expressed regret in this matter but he has not conveyed true remorse. He presented himself as very frightened and is obviously immature. If it were not for the seriousness and gravity of the offense, it is felt that defendant would have been suitable for probation, but based on his convictions in this matter, he is neither eligible, not suitable for a grant of probation. On behalf of the victim's family, as well as the future protection of the community, a lengthy state prison commitment is clearly warranted."

The Eighth Amendment to the United States Constitution declares: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The clause is "applicable to sentences for terms of years." (*Lockyer v. Andrade* (2003) 538 U.S. 64,72.)

Article I, section 17, of the California Constitution proscribes "[c]ruel or unusual punishment." A prison sentence runs afoul of article I, section 17, if it is "so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (In re Lynch (1972) 8 Cal. 3d 410,424, fn. omitted.)

"With respect to 'the nature of the offense,' we recognize that when it is viewed in the abstract robbery-murder presents a very high level of ... danger, second only to deliberate and premeditated murder with malice aforethought. In conducting this inquiry, however, the courts are to consider not only the offense in the abstract – i.e., as defined by the Legislature – but also 'the facts of the crime in question' [citation] – i.e., the totality of the circumstances surrounding the commission of the offense in the case at bar, including such factors as its motive, the way it was committed, the extent of the defendant's involvement, and the consequences of his acts. [¶] Secondly, it is obvious that the courts must also view 'the nature of the offender' in the concrete rather than the abstract: although the Legislature can define the offense in general terms, each offender is necessarily an individual ... This branch of the inquiry therefore focuses on the particular person before the court, and asks whether the punishment is grossly disproportionate to the defendant's

individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind." (*People v. Dillon*
(1983) 34 Cal. 3d 441,479.)

The significance of age has also been discussed by our United States Supreme Court in Roper v. Simmons (2005) 543 U.S. 551. "Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, ...'[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.' [Citations.] ... [¶] The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. [Citation.] ... [¶] The third broad difference is that the character of the juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed. [Citation.] These differences render suspect any conclusion that a juvenile falls among the worst offenders. The susceptibility of juveniles to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensible as that of an adult.' [Citation.]... The reality that juveniles still struggle to define their identity means it is less supportable to conclude thateven a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." (Id. at pp. 569-570.)

Age matters. Here defendant was 15. Dillon stressed that consequences also matter. And they certainly did in this situation. Had Mr. Davila not been murdered, defendant would have been eligible for probation.

"The exact scope of the constitutional phrase 'cruel and unusual' has not been detailed by this Court. But the basic policy reflected in these words is firmly established in the Anglo-American tradition of criminal justice. The phrase in our Constitution was taken directly from the English Declaration of

Rights of 1688, and the principle it represents can be traced back to the Magna Carta. The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State had the power to punish, the Amendment stands to assure that this power be exercised with the limits of civilized standards." (Trop v. Dulles (1958) 356 U.S. 86, 99-100, fns. omitted.)

A 50-year term should be reserved for our worst offenders. A 50-year-to-life term for an immature 15-year-old with an underdeveloped sense of responsibility, who was an aider and abettor and not the shooter, and who had a relatively minor criminal record, is not within the limits of civilized standards. It is cruel and unusual punishment.

MOORE, J.

APPENDIX B

Court of Appeal, Fourth Appellate District, Division Three-No. G039806

S171835

IN THE SUPREME COURT OF CALIFORNIA
EN BANC

THE PEOPLE, Plaintiff and Respondent

v.

RICHMAN EM, Defendant and Appellant

The petition for review is denied.

Kennard and Werdegar, JJ., are of the opinion the petition should be granted.

GEORGE
Chief Justice

Note: The copy of the above decision supplied to petitioner bore a Supreme Court Filed stamp dated June 10, 2009, and the name of Frederick K. Ohlrich, Deputy Clerk

APPENDIX C

U.S. Constitution, 8th Amendment: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

APPENDIX D

California Constitution, Article I, section 17: "Cruel or unusual punishment may not be inflicted or excessive fines imposed."

APPENDIX E

28 U.S.C. 1257(a): "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or treaties or statutes of, or any commission held or authority exercised under, the United States."

APPENDIX F

California Statutes

Penal Code § 186.22(a): "Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years."

Penal Code § 187: "(a) Murder is the unlawful killing of a human being, or a fetus, with malice aforethought."

Penal Code § 12022.53(d): "Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), Section 246, or subdivision (c) or (d) of Section 12034, personally and intentionally discharges a firearm and proximately causes great bodily injury, as defined in Section 12022.7, or death, to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life."

Penal Code §12022.53(e)(1) (in effect at the time of the offense herein): "The enhancements provided in this section shall apply to any person who is a principal in the commission of

an offense if both of the following are pled and proved:

(A) The person violated subdivision (b) of Section 186.22.

(B) Any principal in the offense committed any act specified in subdivision (b), (c), or (d)."

Welfare and Institutions Code § 707(2)(A): "Except as provided in subdivision (b) of Section 602, the district attorney or other appropriate prosecuting officer may file an accusatory pleading against a minor 14 years of age or older in a court of criminal jurisdiction in any case in which any one or more of the following circumstances apply:

(A) The minor is alleged to have committed an offense which if committed by an adult would be punishable by death or imprisonment in the state prison for life.

(C)(ii) The offense was committed for the benefit of, at the direction of, or in association with any criminal street gang, as defined in subdivision (f) of Section 186.22 of the Penal Code, with the specific intent to promote, further, or assist in any criminal conduct by gang members."

APPENDIX G

California Rules of Court

Rule 8.268. Rehearing

(a) Power to order rehearing

(1) On petition of a party or on its own motion, a reviewing court may order rehearing of any decision that is not final in that court on filing.

Rule 8.532. Filing, finality, and modification of decision

(b) Finality of decision

(2) The following Supreme Court decisions are final on filing:

(A) The denial of a petition for review of a Court of Appeal decision;

APPENDIX H

5th and 14th Amendments to the United States Constitution

Fifth Amendment: "No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment (in relevant part): "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX I

CALCRIM 401

401. Aiding and Abetting: Intended Crimes

To prove that the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that:

1. The perpetrator committed the crime:

2. The defendant knew that the perpetrator intended to commit the crime;

3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime;

AND

4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime.

Someone aids and abets a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime.

If all of these requirements are proved, the defendant does not need to actually have been present when the crime was committed to be guilty as an aider and abettor.

[If you conclude that defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor. However, the fact that a person is present at the scene of a crime or fails to prevent the crime does not, by itself, make him or her and aider and abettor.]

[A person who aids and abets a crime is not guilty of that crime if he or she withdraws before the crime is committed. To withdraw, a person must do two things:

1. He or she must notify everyone else he or she knows is involved in the commission of the crime that he or she is no longer participating. The notification must be made early enough to prevent the commission of the crime.

AND

2. He or she must do everything reasonably within his or her power to prevent the crime from being committed. He or she does not have to actually prevent the crime.

The People have the burden of proving beyond a reasonable doubt that the defendant did not withdraw. If the People have not met this burden, you may not find the defendant guilty under an aiding and abetting theory.]

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(2)

No. 09-271

Supreme Court, U.S.
FILED
DEC 24 2009
OFFICE OF THE CLERK

In the Supreme Court of the United States

RICHMAN EM, *Petitioner,*
v.
CALIFORNIA, *Respondent.*

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION THREE

RESPONDENT'S OPPOSITION TO CERTIORARI

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QUESTIONS PRESENTED

1. Whether a sentence of 50 years to life with the possibility of parole for a juvenile who aided and abetted a gang-related felony-murder, but who was not the shooter, constituted cruel and unusual punishment under the California Constitution and the Eighth Amendment.

2. Whether the evidence was insufficient to convict petitioner of first degree murder.

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STATEMENT OF FACTS AND PROCEDURAL BACKGROUND[1]

Shortly after midnight on May 11, 2006, while sitting in his parked police cruiser, Garden Grove Police Officer David Scroggins heard four shots fired nearby. He looked toward a self-service carwash across the street and saw a Toyota Corolla emerge from the carwash; he followed it and initiated a felony vehicle stop. Four persons were in the car: two Asian men -- petitioner and Narong Thongdeng; Joshua Richards; and Sharon Pech. A handgun was partially concealed below the driver's seat, and a blue-and-white bandana was on the backseat.

Another officer, Timothy Kovacs, was dispatched to the carwash, where he found Miguel Davila in the driver's seat of his car. Davila had been shot several times. Officer Kovacs asked him what had happened; Davila replied, "they shot me." When asked who had done this, Davila replied, "two Asian guys" wearing bandanas. Three bullet casings were found in Davila's car, and one was found outside the front passenger side door.

Davila died as a result of exsanguination from the four bullets that had penetrated him. Two of the bullets caused the fatal injuries.

Later that morning, police interviewed petitioner. He admitted he was "jumped into" the Exotic Family City Crips (EFCC) gang in January 2005. That gang had about 30 members, most of whom were Cambodian. Petitioner's moniker was "Lolo."

Petitioner told the officers he had met Thongdeng, whose moniker was "Joker," a few days before the shooting. He had met Richards, whose moniker was "Thug," the previous day. Thongdeng

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[1] The factual and procedural background is a synopsis taken from the Court of Appeal's opinion, published at *People v. Em*, 171 Cal. App. 4th 964, 967-70 (2009).

and Pech picked up petitioner in Wilmington and drove to Long Beach about 10:30 p.m. on May 10. They picked up Richards, drove to Garden Grove, and pulled into the carwash. Petitioner initially told the officers that he got out of the car to urinate, heard gunshots, and saw Thongdeng running back to the car. Petitioner further said that, after he hopped back in the car, Thongdeng tossed a gun to him and petitioner slid it under the driver's seat before the car was stopped by Officer Scroggins.

As the interview continued, petitioner changed his story. Ultimately, petitioner stated that, after he urinated, he went back to the car, where Thongdeng and Richards said, "they wanted to steal [Davila's] car and stuff." Richards had a gun in his pocket, and had given it to Thongdeng when they arrived at the carwash. Petitioner and Richards told Thongdeng "it's on" him if he wanted to do it. Petitioner stated, "I didn't know he was going to shoot him. I thought he was just going to take the car." Petitioner saw Thongdeng demand money and car keys from Davila, and then saw Thongdeng shoot Davila.

When petitioner, Thongdeng, and Richards got back in the car, Richards said to Thongdeng, "[m]an, I should have never gave it [the gun] to you. I knew you was going to pop him." When the police asked petitioner, "[w]hat'd you and [Richards] say when [Thongdeng] came up with the idea to rob this guy," petitioner responded, "we didn't say nothing. It was like . . . we just said it's on you. . . . [¶] . . . [¶] We didn't say nothing. We just said it', on you if you want to do it and he said, yeah, I'm a . . . he's just like, 'Well, give it to me. I'm gonna do it.' He just came up to him and did it."

At trial, a gang expert testified about the dynamics of the EFCC gang and that petitioner, Thongdeng, and Richards were active members of the gang. The expert further explained that the dark clothing petitioner was wearing at the time of Mr. Davila's shooting would assist a gang member in committing crimes at night without being seen, and would make it more difficult to identify him later.

A jury in Orange County convicted petitioner of first degree murder (Cal. Penal Code § 187(a)) and active participation in a criminal street gang (Cal. Penal Code § 186.22(a)). The jury further found petitioner guilty for the vicarious discharge of a firearm by a gang member, causing death (Cal. Penal Code § 12022.53(d) & (e)(1)), and that the murder had been committed for the benefit of, at the direction of, or in association with a criminal street gang (Cal. Penal Code § 186.22(b)).

The court sentenced petitioner to a total of 50 years to life. The sentence consisted of an indeterminate term of 25 years to life for the murder with a consecutive indeterminate term of 25 years to life for the firearm enhancement.

On appeal, petitioner urged that the evidence was insufficient for the jury to convict him of first degree murder. He further contended that the consecutive sentences amounting to an indeterminate term of 50 years to life *with* the possibility of parole constituted cruel and unusual punishment under both the California Constitution and the Eighth Amendment.

The California Court of Appeal rejected all of Petitioner's claims. *People v. Em*, 171 Cal. App. 4th at 969-77. The California Supreme Court denied review. In the present petition for Certiorari, petitioner raises the same contentions he raised in the Court of Appeal and in the California Supreme Court.

REASONS FOR DENYING THE WRIT

This Court should deny the writ as to both questions.

As to the sufficiency of evidence claim, petitioner does not to suggest that the Court of Appeal's conclusion as to the sufficiency of evidence raises an important issue of law that should or needs to be resolved by this Court. To the contrary, the Court of Appeal applied the well-established and correct legal standard in properly reviewing the

record. Petitioner asks this Court merely to re-apply the standard and to reweigh the evidence.

As to the cruel and unusual punishment claim, petitioner's request for this Court to review the Court of Appeal's decision under the California Constitution is inappropriate. This Court does not grant certiorari to review questions of state law. Instead, the California courts are the final arbiters of questions that arise under the state constitution. Here, the Court of Appeal properly applied controlling California Supreme Court precedent in analyzing Petitioner's claim under the state constitution.

To the extent Petitioner asserts that his punishment violated his Eighth Amendment rights, this Court should deny the writ because petitioner forfeited this claim under state procedural law. Further, the state court correctly determined that petitioner's punishment—an indeterminate term allowing for the possibility of parole—is not unconstitutional. Nor will this case likely be controlled by decisions in the pending *Graham*[2] and *Sullivan*[3] cases, which involve non-murder sentences without any possibility of parole.

A. This Court Should Not Grant Certiorari to Review the Fact-Bound Question of Whether the State Court Reached the Correct Result in Applying the Well-Established and Proper Standard for Assessing the Sufficiency of the Evidence

Petitioner asserts that this Court should grant the Writ because the evidence failed to establish that he aided and abetted the murder. He urges that the evidence simply showed his presence at the crime

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[2] *Graham v. Florida* (No. 08-7412)
[3] *Sullivan v. Florida* (No. 08-7621)

scene rather than any degree of active participation. (Petition at 5.) In raising this claim, petitioner fails to acknowledge that the Court of Appeal applied the substantial evidence standard of review articulated by this Court. He further glosses over the evidence establishing his active participation in the robbery that resulted in Davila's death.

"The principal purpose of this Court's exercise of its certiorari jurisdiction is to clarify the law." *Caperton v. A.T. Massey Coal Co., Inc.*, ___ U.S. ___, 129 S. Ct. 2252, 2274, 173 L.Ed.2d 1208 (2009) (Scalia, J., dissenting). Petitioner fails to demonstrate how this Court's exercise of certiorari jurisdiction to review whether substantial evidence supported his conviction would clarify the law. Moreover, under this Court's Rule 10, which explains the general criteria for the exercise of this Court's certiorari jurisdiction, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

The Court of Appeal properly applied the standard of review articulated by this Court in *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979): "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Original italics.) The Court of Appeal reviewed the "entire record in the light most favorable to the judgment" for "evidence that [was] reasonable, credible, and of solid value such that a reasonable trier of fact could [have found] the defendant guilty beyond a reasonable doubt." *People v. Em*, 171 Cal. App. 4th at 970.

Applying this well-settled standard, the Court of Appeal explained that the record disclosed substantial evidence supporting the jury's conclusion that petitioner shared Thongdeng's intent to commit the robbery, that he aided and abetted and was an integral part of the robbery, that he did so for the benefit of his gang, and that he was therefore liable for the murder under a felony-murder theory. *People*

v. Em, 171 Cal. App. 4th at 970-71. The Court of Appeal reasonably and properly applied this Court's controlling precedent to the facts of this case in concluding that substantial evidence supported the judgment. Nothing in the Court of Appeal's conclusion warrants this Court's exercise of certiorari jurisdiction because there is nothing that raises an ambiguity as to the law.

B. Whether Petitioner's Sentence of 50 Years to Life Violated the California Constitution is not a Basis for Granting the Writ.

The bulk of petitioner's claim, that his punishment was unconstitutional, is asserted under the Article I, section 17, of the California Constitution, which provides that "cruel or unusual punishment may not be inflicted or excessive fines imposed." (Petition at 6-7.) To the extent Petitioner claims his punishment was unconstitutional under the California Constitution, the claim raises only a state-law question and is therefore not a proper subject for certiorari review by this Court. The California state courts are the final arbiters of what the cruel or unusual punishment clause of the California Constitution means. "'It is fundamental that state courts be left free and unfettered by [this Court] in interpreting their state constitutions.'" *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 78, 121 S.Ct. 471, 148 L.Ed.2d 366 (2000), quoting *Minnesota v. National Tea Co.*, 309 U.S. 551, 557, 60 S. Ct. 676, 84 L. Ed. 920 (1940). Thus, this Court should not grant the writ to review the Court of Appeal's application of the cruel or unusual punishment clause of the California Constitution.

C. Petitioner's Sentence of 50 Years to Life with the Possibility of Parole is Constitutional

Petitioner cursorily asserts that his punishment of 50 years to life with the possibility of parole

violates the proscription against cruel and unusual punishment under the Eighth Amendment. (Petition at 8-9.) Although this federal claim could be considered by this Court, this Court should deny the writ for three reasons.

First, petitioner is procedurally barred from raising the claim because he forfeited it when he failed to object on this ground in the trial court. Second, the Court of Appeal correctly applied this Court's Eighth Amendment jurisprudence when it concluded that Petitioner's sentence was constitutional. Third, this case is materially different from the *Graham* and *Sullivan* cases pending in this Court because, despite being a juvenile, petitioner was sentenced for his complicity in a murder to a an indeterminate life term that provides for the possibility of parole. Because this case differs from the *Graham* and *Sullivan* cases, this Court need not hold the Petition pending resolution of those cases.

1. Petitioner Forfeited the Claim By Failing to Object to the Sentence in the Trial Court

Petitioner is procedurally barred from challenging the constitutionality of his sentence. As the Court of Appeal noted, he forfeited the claim "by failing to raise it in the trial court in the first instance." *People v. Em*, 171 Cal. App. 4th at 971, n. 5. The Court of Appeal's state-law procedural-bar ruling provides an independent ground supporting the judgment so that any ruling by this Court on the Eighth Amendment question would be advisory only and would not change the judgment. Under such circumstances, the Writ must be denied. *Michigan v Long*, 463 U.S. 1032, 1040-1041 (1983).

Petitioner may counter that his procedural default is immaterial in light of the fact that the Court of Appeal addressed the merits of his constitutional claim. However, as that court explained, it opted to address the merits of

Petitioner's claim "in the interest of judicial economy to prevent the inevitable ineffectiveness-of-counsel claim." *People v. Em*, 171 Cal. App. 4th at 971, n.5. The Court of Appeal's decision to address the merits in the alternative, however, does not deprive the separate state-law procedural-default ruling of its preclusive or restrictive effect on federal-court jurisdiction. *Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989); *see also Coleman v. Thompson*, 501 U.S. 722, 750 (1991). Therefore, in light of the state-law procedural ground supporting the judgment, this Court should deny the Writ.

2. The Court of Appeal Reasonably Applied this Court's Eighth Amendment Jurisprudence in Concluding that Petitioner's Sentence was Constitutional

This Court should deny the Writ because the Court of Appeal reasonably applied this Court's established Eighth Amendment jurisprudence and did not erect a conflict of law with any of the federal circuits that should be resolved by this Court. *See* Supreme Court Rule 10. The length of prison sentences for felonies is primarily a matter for the States and for the legislative branch of government to determine. *Lockyer v. Andrade*, 538 U.S. 63, 70-74, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003); *Harmelin v. Michigan*, 501 U.S. 957, 998-99, 115 L. Ed. 2d 836, 111 S. Ct. 2680 (1991) (recognizing the primacy of the legislature in affixing punishments for criminal conduct) (Kennedy, J. concurring).

Outside the context of the death penalty, the "Eighth Amendment . . . contains a 'narrow proportionality principle.'" *Ewing v. California*, 538 U.S. 11, 20, 123 S. Ct. 1179, 155 L. Ed. 2d 108 (2003) (quoting *Harmelin v. Michigan*, 501 U.S. at 996-97). Under this narrow proportionality principle, the Eighth Amendment "does not require strict proportionality between crime and sentence." *Ewing v. California*, 538 U.S. at 23. "Rather, it forbids only

extreme sentences that are 'grossly disproportionate' to the crime." *Id.*

This Court has never invalidated a prison sentence as cruel and unusual on account of its length where the sentence allowed for parole. *See Rummel v. Estelle*, 445 U.S. 263, 274, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980) ("for crimes concededly classified and classifiable as felonies . . . the length of sentence actually imposed is purely a matter of legislative prerogative"). Indeed, successful Eighth Amendment challenges to prison sentences are, as this Court has noted, "exceedingly rare" and require an "extreme" case. *Lockyer v. Andrade*, 538 U.S. at 73; *Rummel v. Estelle*, 445 U.S., at 272.

Here, the Court of Appeal applied the foregoing principles and noted that if, under this Court's decisions in *Lockyer* and *Ewing*, recidivist punishments of 25 years to life and 50 years to life for petty theft did not constitute cruel and unusual punishment, then Petitioner's 50 years to life for "the crime of murder, with a gang enhancement for the vicarious discharge of a firearm resulting in death," could not constitute cruel and unusual punishment. *People v. Em*, 171 Cal. App. 4th at 977. In light of this Court's Eighth Amendment decisions, Petitioner's punishment, which allows for parole, is not cruel and unusual.

3. Although Petitioner is a Juvenile, this Case is Materially Different from the *Graham* and *Sullivan* Cases Pending in this Court

Nor is there any reason to grant certiorari or hold this case in light of the pending *Graham* and *Sullivan* cases. In *Graham*, the 16-year old defendant was placed on probation for armed burglary with assault or battery, a first-degree felony punishable by life in prison, and for attempted armed robbery, a second-degree felony. *Graham v. State*, 982 So.2d 43, 45 (2008). After serving a one-year jail term, the defendant violated probation by committing

two armed home-invasion robberies and confessing to the commission of several more. The court sentenced the then 19-year old to life in prison *without* the possibility of parole. *Id.* In *Sullivan*, the recidivist defendant was 13 years old in 1989 when he raped a woman in her home. He was sentenced to life in prison *without* the possibility of parole. (Petition for Writ of Certiorari, *Sullivan v. Florida* (08-7621), at 5-6.)

There are significant differences between the instant case and the pending *Graham* and *Sullivan* cases. First, unlike the defendants in *Graham* and *Sullivan*, who were convicted of non-homicides, petitioner was convicted of the most serious class of offenses—that of first degree murder. Second, unlike the defendants in *Graham* and *Sullivan*, petitioner is still eligible for parole.

Petitioner may counter that, although he was convicted of first degree murder, he was not as culpable as his accomplice because he was not the shooter. This assertion, on its own, demonstrates the impropriety of granting the writ because this Court would then need to make individualized factual determinations as to petitioner's culpability.[4] Such individualized considerations have historically been reserved for determining whether capital punishment is appropriate and not whether an indeterminate sentence with the possibility of parole is appropriate. *See Harmelin v. Michigan*, 501 U.S. at 996 ("We have drawn the line of required individualized sentencing at capital cases, and see no basis for extending it further.") Additionally, that petitioner was not the shooter is immaterial in light of this Court's pronouncement that *capital* punishment is constitutional when imposed upon an accomplice who actively participates in the

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[4] This further underscores the procedural default. Petitioner did not object in the trial court and therefore never developed the record with any evidence as to his individual culpability.

commission of a dangerous felony and who does so with reckless disregard for human life. *Tison v. Arizona*, 481 U.S. 137, 157-58, 107 S. Ct. 1676; 95 L. Ed. 2d 127 (1987).

Moreover, granting the writ would require this Court to step into the quagmire of making proportionality determinations as to the propriety of imposing indeterminate terms for juvenile murder accomplices—determinations that are best left to the state legislatures. *Rummel v. Estelle*, 445 U.S. at 274. Additionally, this Court would have to decide on the propriety of consecutive enhancing sentencing schemes and whether the imposition of an indeterminate term for the use of a firearm consecutive to an indeterminate term for murder when imposed upon a juvenile violates the constitution. However, whether a punishment is grossly disproportionate to the crime will only be found in the rare or exceptional case. *Lockyer v. Andrade*, 538 U.S. at 73. This Court has invalidated only two federal or state sentencing statutes for being grossly disproportionate. In *Weems v. United States*, 217 U.S. 349, 367, 30 S. Ct. 544, 54 L. Ed. 793 (1910), this Court invalidated a sentence of fifteen years in chains and at hard labor, plus permanent surveillance and civil disabilities, for the crime of falsifying a public document. Seventy-three years later, in *Solem v. Helm*, 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983), this Court invalidated a sentence of life imprisonment *without* the possibility of parole imposed under South Dakota law against a nonviolent recidivist whose final crime was uttering a check with the intent to defraud.

By stark contrast, petitioner was sentenced to an indeterminate life term with the possibility of parole for a crime far more serious than falsifying public documents or uttering bad checks. There is nothing inherently disproportionate, let alone grossly disproportionate, as to the punishment petitioner received for his crime. Indeed, this Court has upheld a 40-year sentence for possession and distribution of 9 ounces of marijuana. *Hutto v. Davis*, 454 U.S. 370, 375, 102 S. Ct. 703, 70 L. Ed. 2d 556 (1982), and a life

sentence, *without* the possibility of parole, for possession of more than 650 grams of cocaine. *Harmelin*, 501 U.S. at 1005.

In any event, the Court of Appeal, here, engaged in a thorough proportionality review, in which it analyzed individualized considerations, under the state constitution. The Court of Appeal considered the seriousness of petitioner's offense in aiding and abetting the felony murder, his integral role in assisting Thongdeng in carrying out the gang robbery, his culpability in light of his knowledge Thongdeng was armed, his age, his prior criminal record and how he was on probation with gang conditions at the time of the instant crime. *People v. Em*, 171 Cal.App.4th at 972-76. While the court acknowledged that age matters, it further recognized that murder also matters. *Id.* at 976. Thus, the court concluded, based on all the individualized factors at play, that petitioner's punishment was proportionate with his crime. *Id.* Notably, in analyzing petitioner's claim under the California Constitution, the Court of Appeal engaged in an individualized analysis that is more exacting than required under the Eighth Amendment, which only compels such analysis for capital cases. See *Harmelin v. Michigan*, 501 U.S. at 996.

Although parole is available to petitioner, he might argue that, because parole is not possible for 50 years, he is serving the functional equivalent of a life term without the possibility of parole. However, unlike in *Graham* and *Sullivan* where parole is not available at all, the length of time before Petitioner is eligible for parole is a function of consecutive sentencing Petitioner received two consecutive 25 years to life terms because he aided and abetted a robbery which resulted in death (felony-murder) *and* because he aided and abetted a fellow armed gang member (vicarious firearm enhancement) in that robbery. If petitioner had committed or aided and abetted an unarmed robbery resulting in the death of the victim, he would be eligible for parole in 25 years. That the legislature opted to punish the use of a firearm by a gang member in the commission of a

crime with a consecutive term of 25 years to life should not be second-guessed by this Court. *Harmelin v. Michigan*, 501 U.S. at 998-99 (Kennedy, J. concurring); *Rummel v. Estelle*, 445 U.S. at 274.

California's gang firearm enhancement imposed upon petitioner is akin to a the federal firearm enhancement under 18 U.S.C. § 924(c) which imposes mandatory additional punishment when a firearm is used in the commission of a drug or other violent felony. The Circuit Courts of Appeals have uniformly concluded that application of this enhancing federal sentencing provision passes constitutional muster even when imposition thereof could result in a term of years that could exceed the reasonable life expectancy of a defendant. *See United States v. Walker*, 473 F.3d 71, 79-84, fn. 6 (7th Cir. 2007) (providing a comprehensive overview of Circuit Courts of Appeals rejecting an Eighth Amendment challenge to the mandatory sentencing provisions of 18 U.S.C. § 924(c)); *United States v. Beverly*, 369 F.3d 516, 537 (6th Cir. 2004) (a lengthy sentence under 18 U.S.C. § 924(c), "even if it might turn out to be more than the reasonable life expectancy of the defendant" is not cruel and unusual punishment). That petitioner was punished with two consecutive indeterminate terms of 25 years to life because of the substantive felony murder and his aiding and abetting an armed gang member in the commission of the robbery, which resulted in death, is no different – it passes constitutional muster. Although the mandatory consecutive sentencing provisions at play in this case might be harsh, much like the provisions of 18 U.S.C. § 924(c), they are certainly not unusual in the constitutional sense. *Harmelin v. Michigan*, 501 U.S. at 994 ("Severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense").

That petitioner was three months shy of 16 years old is of no significant moment. Unlike this Court's decision in *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1, 13 (2005), in which this Court struck down application of *capital punishment* for juveniles, this case involves a

juvenile who is serving a life sentence and will become eligible for parole. That eligibility, albeit in 50 years, and the fact that petitioner stands convicted for murder, places this case in an entirely different light from the *Graham* and *Sullivan* cases, in which parole for non-homicide offenses was not available. As this Court noted in *Harmelin*, Petitioner still enjoys the hope of possible "flexible techniques" for sentence reduction, in addition to "retroactive legislative reduction and executive clemency." *Harmelin v. Michigan*, 501 U.S. at 996.

In sum, petitioner's case contrasts sharply with the *Graham* and *Sullivan* cases. Petitioner is eligible for parole even though the jury convicted him for complicity in a first degree murder and found that he willingly and intentionally aided an armed fellow gang member in the robbery which resulted in the killing of the victim. This is materially different from the defendants in *Graham* and *Sullivan* who committed non-homicidal crimes and were punished with life imprisonment *without* the possibility of parole. This Court need not hold this case pending resolution of *Graham* and *Sullivan* because of the material differences between those cases and the instant matter.

CONCLUSION

For the foregoing reasons, respondent respectfully requests this Court to deny the Petition for Writ of Certiorari.

Dated: December 23, 2009
Respectfully submitted

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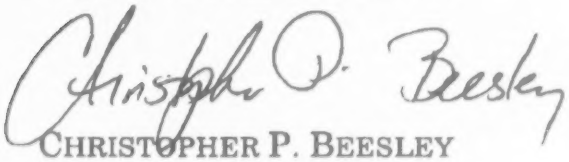

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